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DELTAKEEPER® chapter

July 24, 2006

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State Water Resources Control Board
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RE: Petition for Review of Waste Discharge Requirements (NPDES No. CA0085171) for the California Department of Parks and Recreation Empire Mine State Historic Park, Issued by Regional Board Order No. R5-2006-0058

Dear Ms. Jennings and State Water Resources Control Board:

Baykeeper and its Deltakeeper Chapter[1] (hereinafter "Deltakeeper") hereby petition the State Water Resources Control Board ("State Board") for review of the National Pollutant Discharge Elimination System ("NPDES") Permit No. CA0085171 ("the Permit") issued on June 23, 2006 by the California Regional Water Quality Control Board, Central Valley Region ("Regional Board"), by Order No. R5-2006-0058, for discharges of pollutants to waters of the United States from Empire Mine State Park ("Empire Mine"). A copy of Order No. R5-2006-0058 is attached hereto as Exhibit A.

As issued by the Regional Board, the Permit mocks the Clean Water Act ("CWA")'s fundamental requirement that NPDES permits include effluent limitations sufficiently stringent to ensure the attainment of CWA water quality standards ("WQS"). WQS are meant to protect the water quality needed for our State's waters to be usable for fishing, swimming, drinking and irrigation water supply, wildlife habitat, and the various other beneficial uses of such waters. Thus, permit limits that ensure attainment of WQS are key to the CWA's scheme of ensuring that the beneficial uses of the public's waters are protected. Rather than set effluent limitations necessary to ensure attainment of WQS, the Permit sets limits on the discharge of several toxic pollutants that are shockingly higher. The Permit's limit on the discharge of cadmium is 8,000 times an appropriate WQS-based limit, on thallium about 3,500 times higher, on lead about 2,500

[1] Baykeeper's Deltakeeper Chapter is a fictitious business name under which Baykeeper conducts some of its business.

times higher, on zinc about 310 times higher, on copper about 140 times higher, on mercury about 100 times higher, on nickel 8 times higher, and on chromium 6 times higher. The Permit reflects a conclusion utterly discordant with the CWA, that discharging hazardous waste to a waterway so dangerous that the public needs to be fenced out of the area for its own good constitutes full compliance with the CWA, a statute which declares its purpose to be "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Respecting both these goals and the letter of CWA law requires the State Board to reverse the Regional Board's Permit decision with instructions to include in the Permit immediately effective appropriate WQS-based effluent limitations ("WQBELs").

Deltakeeper raised and presented all the issues addressed in this Petition to the Regional Board in a May 5, 2006 public comment letter duly submitted to the Regional Board during the applicable public comment period on the Permit and in live oral testimony at the June 23, 2006 public hearing before the Regional Board on the Permit. The comment letter is attached to the Petition as Exhibit B. Deltakeeper has sent copies of this Petition to the Regional Board and to the discharger.

I. *Factual Background*

A. *Deltakeeper*

Baykeeper is a regional non-profit public benefit corporation organized under the laws of the State of California. Baykeeper's mission is to protect and enhance the water quality of the San Francisco Bay-Delta estuary and its watershed for the benefit of its ecosystems and human communities. Through its on-the-water chapters, Baykeeper patrols thousands of miles of waterways throughout the Bay and Delta, investigating pollution problems and bringing enforcement actions against polluters directly when necessary. The Deltakeeper Chapter of Baykeeper carries out this mission on the Sacramento - San Joaquin River Delta and its tributaries in California's Great Central Valley.

Founded in 1989, Baykeeper is the premier legal and policy advocate for the San Francisco Bay and Delta and their vast watershed, from the High Sierra to the Golden Gate. Using targeted administrative and legal advocacy before the State and regional regulators, Baykeeper plays a lead role in developing sound and legal standards, permits, and regulations. A key area of the group's focus is ensuring that State and Federal environmental laws are implemented properly and enforced. Where necessary, Baykeeper initiates enforcement actions on behalf of its members and itself.

Baykeeper, Deltakeeper and its members and the general public are adversely impacted by the discharge of pollutants from Empire Mine, which is having a serious adverse impact on the Wolf Creek watershed. Baykeeper, Deltakeeper and its members

and the general public are aggrieved by the Regional Board's Permit decision because the Permit renders these discharges lawful under the CWA, thus beyond the public's ability to seek remedy for these discharges under the enforcement provisions of the CWA (which include action by the United States Environmental Protection Agency ("EPA"), the Federal agency primarily responsible for protection the nation's waters, and/or by citizens).

Baykeeper's main office is located at 785 Market Street, Suite 850, San Francisco, California 94103. Deltakeeper is located at 445 Weber Avenue, #137B, Stockton, California 95203 and may be reached via telephone at (209) 464-5090, Fax at (209) 464-5174 or electronic mail at carrie@baykeeper.org.

Deltakeeper's counsel's contact information is as follows: Christopher Sproul, Environmental Advocates, 5135 Anza Street, San Francisco, California 94121, Telephone: (415) 533-3376, Fax: (415) 358-5695, E-Mail: csproul@enviroadvocates.com and Daniel Cooper, Lawyers for Clean Water, Inc., 1004 O'Reilly Avenue, San Francisco, California 94129, Telephone: (415) 440-6520, Fax: (415) 440-4155, Email: cleanwater@sfo.com.

B. ***Empire Mine's Magenta Drain Toxic Discharge***

Empire Mine, located in Grass Valley, is currently owned by the California Department of Parks and Recreation ("DPR"). The mine was the richest hard rock mine in California's history, operating for 106 years and produced 5.8 million ounces of gold. It ceased operations in 1956, and in 1975, the State purchased the surface rights and opened Empire Mine State Park to the public. The above ground park consists of 856 acres. Empire Mine has approximately eight abandoned mines and numerous mine waste piles, tailings, and other disposal areas.

Of particular concern is Empire Mine's discharge of pollutants from the Magenta Drain. The Magenta Drain is connected to a tunnel that begins at or near the 400-foot level of the Empire Mine shaft. The tunnel runs under land owned by DPR and private landowners, and under Highway 174. The historic use of the Magenta Drain is to drain excess water that builds up in the mineshafts. The Magenta Drain discharges the excess water from the mineshafts to an unnamed tributary of the South Fork of Wolf Creek. The Magenta Drain is located in a residential area and polluted wastewater discharging from the Magenta Drain flows through a recreational park used by local residents and tourists. The discharge from the Magenta Drain occurs year round and has a flow that ranges from 75 gallons per minute to over 700 gallons per minute depending on the season.

In December 2004, Tetra Tech EM, Inc. ("Tetra Tech") prepared a Source Assessment and Evaluation of Remediation Measures for Metals in Surface Water ("Magenta Drain Report") for DPR. The Magenta Drain Report documents the massive

amounts of pollutants discharging from the Magenta Drain into Wolf Creek. In particular, the discharge from Magenta Drain has levels of cadmium, thallium, lead, zinc, copper, mercury, nickel, chromium, aluminum, antimony, arsenic, barium, cobalt, iron, manganese, and vanadium exceeding levels that will cause or contribute to exceedance of numeric and/or narrative WQS applicable to affected waters. Additionally, immediately downstream of the discharge, the Magenta Drain Report indicates the presence of ferric iron oxyhydroxide ("yellow boy") "coating the creek with a thick layer..." Magenta Drain Report, ES-3. Upon sampling, the yellow boy was found to be a hazardous material since it contains concentrations of arsenic above the soluble threshold limit concentration ("STLC"). All told, the Magenta Drain Report indicates that the water discharging from the Magenta Drain should be of great concern to the Regional Board and the public.

C. *Risk to Aquatic Environment and Wildlife*

The discolored, year-round drainage from Magenta Drain's portal into an unnamed waterway traverses a very public part of the town, including a city park, posing substantial risks to local residents. This contaminated creek is accessible right next to city tennis courts, from a trail along one side all the way to the portal and from backyards of houses where children's toys are readily visible. Soil discoloration and "yellow boy" remains visible at the portal site. It is unconscionable for the Regional Board to deem full compliance with the CWA to be fencing the public away from such conditions, rather than imposing limits meant to require their remedy.

The creek that receives the Magenta Drain discharge leaves Empire Mine and crosses the city park and then eventually flows to the South Fork of Wolf Creek, Wolf Creek, and the Bear River in the Sacramento River watershed. This creek is tributary to an important riparian watershed, home to a variety of fish, wildlife, and birds. This watershed contributes to downstream water quality in the Delta, drinking sources for 23 million people and home to threatened aquatic life. The Magenta Drain's toxic discharge renders part of this tributary watershed at risk for severe impairment of its value for habitat, public recreation, and drinking water source.

D. *Feasible Remedy*

There are feasible options for beginning effective remedy of the Magenta Drain's toxic discharge–which enforceable WQBELs would provide DPR with full incentive to pursue. The Magenta Drain report discusses options of vacuuming the sediment, installing a year-round treatment system on-site, and stopping discharge for off-site treatment. Removal of the sediment alone will vastly decrease the propensity for increased flow to suspend the toxic sediments into the creek downstream. All of these are treatments that can be done within approximately one year.

E. *The Permit Sets Unreasonably Lax Permit Limits.*

40 C.F.R. section 122.44(d) requires that NPDES permits include WQBELs to attain and maintain applicable numeric and narrative water quality criteria in WQS to protect the beneficial uses of the receiving water. As set out in the chart below, the Permit sets unreasonably lax permit limits that are in some instances astronomically more lenient than appropriately set WQBELs designed to achieve WQS. Applicable California WQS for the Wolf Creek watershed are set forth in two federal regulations promulgated by the EPA known as the National Toxics Rule ("NTR") and the California Toxics Rule ("CTR") and the Regional Board-adopted *Water Quality Control Plan, Fourth Edition, for the Sacramento and San Joaquin River Basins* ("Basin Plan"). *See* 65 Fed. Reg. 31682, 31684-87 (May 18, 2000). The CTR and NTR are set forth at 40 C.F.R. section 131.38 and are explained in the Federal Register preamble accompanying promulgation of the CTR (set forth at 65 Fed. Reg. 31682). In the table below, the columns "WQBELs Average Monthly Concentration" and "WQBELs Maximum Daily Concentration" set forth the limits that the Regional Board should have established as immediately effective WQBELs designed to ensure attainment of the WQS set forth in the NTR, CTR, or Basin Plan. The columns "Interim Limits-Average Monthly" and "Interim Limits-Maximum Daily" set forth the actual limits set by the Regional Board in the Permit, which, as is plainly visible, are many times higher than the WQBELs that the Regional Board should have set.

Parameter (all units ug/L)	Source of WQS	Effluent Limitations			
		Average Monthly Concentration--ug/L	Maximum Daily Concentration--ug/L	WQBELs Average Monthly Concentration—ug/L	WQBELs Maximum Daily Concentration
Cadmium, Total Recoverable	**CTR**	**2,100**	**4,200**	0.26	0.53
Chromium (III)	**CTR**	**220**	**450**	36	72
Copper, Total Recoverable	**NTR**	**170**	**350**	1.2	2.3
Lead, Total Recoverable	**CTR**	**560**	**1,100**	0.23	0.47
Mercury, Total Recoverable	**NTR**	**4.9**	**9.2**	0.050	0.1
Nickel, Total Recoverable	**CTR**	**65**	**130**	8.6	17
Thallium, **Total Recoverable**	**NTR**	**5,900**	**20,000**	**1.7**	**5.6**
Zinc, Total Recoverable	**CTR**	**3,700**	**7,400**	12	24

These exponentially more lenient limits endanger aquatic life and human health.

II. *Argument: The Proposed Compliance Schedule and Interim Effluent Limits Illegally Delay Achievement of Water Quality Standards.*

The Clean Water Act mandates that:

> there shall be achieved . . . not later than July 1, 1977, any more stringent limitations, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations . . . or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). Despite this unambiguous, 29-year-old statutory deadline for achieving WQBELs, the Permit omits water quality-based effluent limits on these parameters and instead imposes a compliance schedule and interim permit limits far more lenient than WQBELs. In so doing, the permit gives DPR an extension for meeting WQBELs that extends far beyond the statutory deadline in CWA section 301(b)(1)(C) for achieving WQBELs. 33 U.S.C. § 1311(b)(1)(C). This approach is blatantly illegal and, if upheld, would directly undermine the WQS that are the heart of the Clean Water Act.

A. *Regional Board Authority To Issue Compliance Schedules under the CTR Has Now Lapsed.*

40 C.F.R. section 131.38(e)(3) formerly authorized compliance schedules delaying the effective date of WQBELs being set based on the NTR and CTR. Pursuant to 40 C.F.R. section 131.38(e)(8), however, this compliance schedule authorization *expressly expired* on May 18, 2005, depriving all Regional Boards and the State Board with any authority to issue compliance schedules delaying the effective date of such WQBELs. Indeed, the EPA Federal Register Preamble accompanying the CTR stated as much, noting, "EPA has chosen to promulgate the rule with a sunset provision which states that the authorizing compliance schedule provision will cease or sunset on May 18, 2005."

The Regional Board may contend that the EPA Federal Register Preamble has effectively extended this compliance schedule authority when the Preamble observed, "[I]f the State Board adopts, and EPA approves, a statewide authorizing compliance schedule provision significantly prior to May 18, 2005, EPA will act to stay the authorizing compliance schedule provision in today's rule." It is true that the State Board subsequently adopted its Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California, enacted by State Board Resolution No. 2000-015 (March 2, 2000) ("State Implementation Plan" or "SIP") and

that the SIP provides for compliance schedules without imposing a May 18, 2005 cutoff. EPA, however, *has not* acted to stay 40 C.F.R. section 131.38(e)(8) by the only means it can lawfully do so: notice and comment rulemaking that amends 40 C.F.R. section 131.38(e)(8). Without such a rulemaking, 40 C.F.R. section 131.38(e)(8) remains the law and it unequivocally ends authorization to issue compliance schedules after May 18, 2000. *See Friends of the Earth, Inc. v. Environmental Protection Agency*, 446 F.3d 140 (D.C. Cir. 2006).

The Regional Board duly noted in its Fact Sheet and the Permit that, absent a compliance schedule, the NTR and CTR would mandate WQBELs for the following pollutants for the Empire Mine discharge: cadmium, chromium, copper, lead, mercury, nickel, thallium, and zinc. *See* Exhibit B – Permit, Attachment F, the Fact Sheet, p. F 20-32. Pursuant to 40 C.F.R. section 131.38(e)(8), the State Board must direct the Regional Board to issue immediately effective WQBELs for all of these pollutants for Empire Mine set in accord with the NTR and CTR.

B. *The State and Regional Boards' Approach To Compliance Schedules Is Unlawful under the CWA.*

Even if 40 C.F.R. section 131.38(e)(8) did not preclude issuing compliance schedules which delay the effective date of WQBELs set under the NTR and CTR, the CWA itself precludes such compliance schedules—and any compliance schedule which delays the effective date of WQBELs past 1977.

1. *CWA Section 301(b)(1)(C) establishes a firm deadline for complying with WQBELs.*

Numerous courts have held that neither the EPA nor the States have the authority to extend the deadlines for compliance established by Congress in CWA section 301(b)(1). 33 U.S.C. §1311(b)(1); *See State Water Control Board v. Train*, 559 F.2d 921, 924-25 (4th Cir. 1977) ("Section 301(b)(1)'s effluent limitations are, on their face, unconditional"); *Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 661 (3d Cir. 1976), *cert. denied sub nom*. *Bethlehem Steel Corp. v. Quarles*, 430 U.S. 975 (1977) ("Although we are sympathetic to the plight of Bethlehem and similarly situated dischargers, examination of the terms of the statute, the legislative history of [the Clean Water Act] and the case law has convinced us that July 1, 1977 was intended by Congress to be a rigid guidepost").

This deadline applies equally to technology-based effluent limitations and WQBELs. *See Dioxin/Organochlorine Ctr. v. Rasmussen*, 1993 WL 484888 at *3 (W.D. Wash. 1993), *aff'd sub nom. Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517 (9th Cir. 1995) ("The Act required the adoption by the EPA of 'any more stringent limitation, including those necessary to meet water quality standards,' by July 1, 1977") (citation

omitted); *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1312 (9th Cir. 1992) ("[Section 1311(b)(1)(C)] requires achievement of the described limitations 'not later than July 1, 1977.' ") (citation omitted). Any discharger not in compliance with a WQBEL after July 1, 1977, violates this clear congressional mandate. *See Save Our Bays and Beaches v. City & County of Honolulu*, 904 F. Supp. 1098, 1122-23 (D. Haw. 1994).

Congress provided no blanket authority in the Clean Water Act for extensions of the July 1, 1977, deadline, but it did provide authority for the States to foreshorten the deadline. CWA section 303(f) (33 U.S.C. § 1313(f)) provides that:

> [n]othing in this section [1313] shall be construed to affect any effluent limitations or schedule of compliance required by any State to be implemented prior to the dates set forth in section 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

Because the statute contains explicit authority to expedite the compliance deadline but not to extend it, the Regional Board may not authorize extensions beyond this deadline in discharge permits.

2. ***The July 1, 1977 deadline for WQBELs applies even where WQS are established after that date.***

The July 1, 1977, deadline for achieving WQBELs applies equally even if the applicable WQS are established after the compliance deadline. 33 U.S.C. section 1311(b)(1)(C) requires the achievement of "more stringent limitations necessary to meet water quality standards . . . established pursuant to any State law . . . or required to implement any applicable water quality standard established pursuant to this chapter." Congress understood that new WQS would be established after the July 1, 1977, statutory deadline; indeed, Congress mandated this by requiring states to review and revise their WQS every three years. *See* 33 U.S.C. § 1313(c). Yet, Congress did not draw a distinction between achievement of WQS established before the deadline and those established after the deadline.

Prior to July 1, 1977, therefore, a discharger could be allowed some time to comply with an otherwise applicable water quality-based effluent limitation. Beginning on July 1, 1977, however, dischargers were required to comply as of the date of permit issuance with WQBELs, including those necessary to meet standards established subsequent to the compliance deadline.

3. *Congress has authorized limited extensions of CWA deadlines for specific purposes, precluding exceptions for other purposes*.

In the Clean Water Act Amendments of 1977, Congress provided limited extensions of the July 1, 1977, deadline for achieving WQBELs. In CWA section 301(i), Congress provided that "publicly-owned treatment works" ("POTWs") that must undertake new construction in order to achieve the effluent limitations, and need Federal funding to complete the construction, may be eligible for a compliance schedule that may be "in no event later than July 1, 1988." 33 U.S.C. § 1311(i)(1) (emphasis added). Congress provided for the same limited extension for industrial dischargers that discharge into a POTW that received an extension under section 1311(i)(1). *See* 33 U.S.C. § 1311(i)(2). In addition, dischargers that are not eligible for the time extensions provided by section 1311(i) but that do discharge into a POTW, may be eligible for a compliance schedule of no later than July 1, 1983. *See* 33 U.S.C. § 1319(a)(6).

The fact that Congress explicitly authorized certain extensions indicates that it did not intend to allow others, which it did not explicitly authorize. In *Homestake Mining*, the Eighth Circuit held that an enforcement extension authorized by section 1319(a)(2)(B) for technology-based effluent limitations did not also extend the deadline for achievement of WQBELs. 595 F.2d at 427-28. The court pointed to Congress' decision to extend only specified deadlines:

> Having specifically referred to water quality-based limitations in the contemporaneously enacted and similar subsection [1319](a)(6), the inference is inescapable that Congress intended to exclude extensions for water quality-based permits under subsection [1319](a)(5) by referring therein only to Section [1311](b)(1)(A).

Id. at 428 (citation omitted). By the same reasoning, where Congress extended the deadline for achieving effluent limitations for specific categories of discharges and otherwise left the July 1, 1977, deadline intact, there is no statutory basis for otherwise extending the deadline.

4. *Schedules of compliance may be issued only to facilitate, not to avoid, achievement of effluent limitations by the statutory deadline.*

The Clean Water Act defines the term effluent limitation as:

> any restriction established . . . on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

33 U.S.C. § 1362(11). The term schedule of compliance is defined, in turn, as "a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard." 33 U.S.C. § 1362(17). The purpose of a compliance schedule is to facilitate compliance with an effluent limitation by the applicable deadline by inserting interim goals along the way:

> [a] definition of effluent limitations has been included so that control requirements are not met by narrative statements of obligation, but rather are specific requirements of specificity as to the quantities, rates, and concentration of physical, chemical, biological and other constituents discharged from point sources. It is also made clear that the term effluent limitation includes schedules and time tables of compliance. The Committee has added a definition of schedules and time-tables of compliance so that it is clear that enforcement of effluent limitations is not withheld until the final date required for achievement.

S. Rep. No. 92-414, at 77, *reprinted in* 1972 U.S.C.C.A.N. 3668 (Oct. 28, 1971) (emphasis added). Thus, Congress authorized compliance schedules, not to extend its deadlines for achievement of effluent limitations, but to facilitate achievement by the prescribed deadlines.

In *United States Steel Corp*., the industry plaintiff argued that 33 U.S.C. § 1311(b)(1)(C) allows the July 1, 1977, deadline to be met simply by beginning action on a schedule of compliance that eventually would result in achieving the technology- and water quality-based limitations. 556 F.2d at 855. The Court of Appeals disagreed:

> [w]e reject this contorted reading of the statute. We recognize that the definition of 'effluent limitation' includes 'schedules of compliance,' section [1362(11)], which are themselves defined as 'schedules . . . of actions or operations leading to compliance' with limitations imposed under the Act. Section [1362(17)]. It is clear to us, however, that section [1311(b)(1)] requires point sources to achieve the effluent limitations based on BPT or state law, not merely to be in the process of achieving them, by July 1, 1977.

Id. Thus, compliance schedule may not be used as a means of evading, rather than meeting, the deadline for achieving WQBELs.

5. ***States may not issue permits containing effluent limitations that are less stringent than those required by the Clean Water Act***.

Finally, a compliance schedule that extends beyond the statutory deadline would amount to a less stringent effluent limit than required by the CWA. States are explicitly prohibited from establishing or enforcing effluent limitations less stringent than are required by the CWA. *See* 33 U.S.C. § 1370; Water Code §§ 13372, 13377. The clear language of the statute, bolstered by the legislative history and case law, establishes unambiguously that compliance schedules extending beyond the July 1, 1977, deadline may not be issued in discharge permits. The Permit, however, purports to do just that. By authorizing the issuance of permits that delay achievement of effluent limitations for over thirty years beyond Congress' deadline, the Permit makes a mockery of the CWA section 301(b)(1)(C) deadline and exceeds the scope of the Regional Board's authority under the Clean Water Act and the Porter-Cologne Act. 33 U.S.C. § 1311(b)(1)(C).

III. Conclusion

The Regional Board acted unlawfully in failing to include immediately effective WQBELs in the Empire Mine Permit. The State Board should reverse the Regional Board's Permit decision and remand the Permit to the Regional Board with instructions to include appropriate WQBELs.

Deltakeeper, however, requests that the State Board hold in abeyance further action on this Petition for up to two years or further notice by Deltakeeper, whichever comes first. Deltakeeper, along with other environmental groups, anticipate filing one or more additional petitions for review challenging NPDES permit decisions by the Regional Boards issuing compliance schedules that delay the effective date of WQBELs in the coming months. For economy of the State Board and all parties, Deltakeeper and these other environmental groups will request the State Board to consolidate these petitions and/or to resolve the common issues presented by these petitions by action on a subset of the petitions. Accordingly, Deltakeeper urges that holding this petition in abeyance for now is a sensible approach.

Respectfully submitted,

Dated: July 21, 2006

By:

Christopher a. Sproul

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cc:

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